Wan Sapiah bte Wan Daud (widow of Basri bin Hussein) v Pengarah Jabatan Perubatan dan Kesihatan Kementerian Kesihatan Malaysia & Ors

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(L)–482 OF 1998
JEFFREY TAN J
1 FEBRUARY 2008

Public Servants — Disciplinary proceedings — Procedure — Deceased absent without leave — Deceased could not be traced — Deceased deemed to have been dismissed by gazette notification — Whether procedure in accordance with governing general order

The deceased joined the civil service on 1 March 1953 (confirmed on 1 March 1956) and was a store keeper at the Health Department in Ipoh. However, by gazette notification dated 1 August 1985, the deceased was deemed to have been dismissed on 7 November 1983 on the grounds of absence without leave. After the death of the deceased on 5 February 1991, the plaintiff applied to the defendants for a widow's pension, but she was turned down on the ground that the deceased had been dismissed. The plaintiff's claim was as the widow of the deceased for a derivative pension. The plaintiff submitted that the defendants adopted both procedures under general orders 21 and 26 of the Public Officers (Conduct and Discipline) (Cap D) General Order 1980. Being mutually exclusive general orders, the defendants could not switch to general order 21 after proceeding under general order 26. Further the plaintiff submitted that general orders 21 and 26 had not been complied. The defendant submitted that under general order 21(5) the procedure was adopted and the gazette complied with general orders 21(5) and 21(6). The plaintiff, in reply contended that the show cause letter gave 14 days to the deceased to reply when it should be more than 14 days. However the defendants submitted that the disciplinary proceedings was not based on the show cause letter but proceeded under the general orders 21(5) and 21(6). Attempts to contact the deceased, showed that the deceased could not be traced.

Held, allowing the application:

The fact of the absence of the deceased was notified in the gazette but the fact of the untraceability of the deceased was not. This was a failure in procedure,

which could not be treated as *de minimis* in favour of the defendants, as it was a breach of a provision which concerned the livelihood of the deceased and the right of the plaintiff to a derivative pension. In *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65, it was held by the former Supreme Court that the maxim *de minimis non curat lex* (the law does not concern itself with trifles) could have no application in a case where the breach of a mandatory requirement involved the civil liberty of an individual. Given that the breach could not be treated as *de minimis*, this application could not be dismissed. The only course open was to grant this application and declare the dismissal of the deceased as invalid (see para 18).

[Bahasa Malaysia summary

Si mati telah menyertai perkhidmatan awam pada 1 Mac 1953 (disahkan perkhidmatan pada 1 Mac 1956) dan adalah seorang penjaga stor di Jabatan Kesihatan Ipoh. Walau bagaimanapun, melalui pemakluman warta bertarikh 1 Ogos 1985, si mati telah dianggap sebagai dipecat pada 7 November 1983 atas alasan tidak hadir tanpa kebenaran. Selepas kematian si mati pada 5 Februari 1991, plaintif memohon kepada defendan-defendan untuk pencen balu, tetapi ditolak atas alasan bahawa si mati telah dipecat. Tuntutan plaintif adalah sebagai balu si mati untuk pencen derivatif. Plaintif menghujah bahawa defendan-defendan menggunakan kedua-dua prosedur di bawah perintah am 21 dan 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Sebagai perintah am yang sama-sama eksklusif, defendan-defendan tidak boleh beralih kepada perintah am 21 selepas memulakan di bawah perintah am 26. Selanjutnya, plaintif menghujah bahawa perintah am 21 dan 26 tidak dipatuhi. Defendan-defendan menghujah bahawa prosedur di bawah perintah am 21(5) yang digunakan dan warta mematuhi perintah am 21(5) dan 21(6). Plaintif, dalam menjawab menghujah bahawa surat tunjuk sebab memberikan 14 hari kepada si mati untuk berhujah apabila ia sepatutnya lebih dari 14 hari. Walau bagaimanapun, defendan-defendan menjawab bahawa prosiding tatatertib tersebut bukan berasaskan surat tunjuk sebab tetapi diteruskan di bawah perintah-perintah am 21(5) dan 21(6). Cubaan-cubaan untuk menghubungi si mati, menunjukkan bahawa si mati tidak boleh dikesan.

Diputuskan:

Fakta si mati tidak hadir kerja dimaklumkan di dalam warta tetapi fakta tidak dapat menghubunginya tidak. Ini adalah satu kegagalan prosedur, yang tidak dapat dianggap sebagai *de minimis* memihak defendan-defendan, oleh kerana ia adalah satu perlanggaran suatu peruntukan yang melibatkan punca pendapatan si mati dan hak plaintif kepada pencen derivatif tersebut.

Di dalam kes *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65, ia telah diputuskan oleh Mahkamah Agong terdahulu bahawa maxim *de minimis non curat lex* (undang-undang tidak mengira perkara yang kecil) tidak terpakai dalam kes di mana satu perlanggaran keperluan mandatori melibatkan kebebasan am seseorang individu. Oleh kerana perlanggaran tidak dapat dianggap sebagai *de minimis*, permohonan ini tidak boleh dibatalkan. Hanya satu cara terbuka ialah dengan membenarkan permohonan ini dan mengisytiharkan pemecatan si mati tidak sah (lihat perenggan 18).]

Notes

For cases on procedure on disciplinary proceedings, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1898–1900.

Cases referred to

Aw Ngoh Leang v Inspector General of Police & Ors [1993] 1 MLJ 65 (refd)
Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61 (refd)
Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor v Aria Kumar & Anor [1995] 2 MLJ 533 (refd)
Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor [2001] 2 MLJ 257 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Sungai Wangi Estate v UNI [1975] 1 MLJ 136 (refd)

Legislation referred to

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general orders 21, 21(1), (3), 21(4), (5), (6), 24, 26, 26(2), (5)
Public Officers (Conduct and Discipline) Regulations 1993

Manjit Kaur Nijar (Nijar & Nijar) for the plaintiff.
Mahamed Naser Desa (Senior Federal Counsel, Attorney-General's Chambers) for the defendants.

Jeffrey Tan J:

[1] This began as an application for declarations to the effect that the dismissal of the plaintiff's late husband from the civil service was wrong, and or null and void, and that the plaintiff's late husband ('deceased') was entitled to all benefits as a civil servant. But in the course of arguments, Miss Manjit Kaur Nijar for the plaintiff withdrew all claims by the estate of the deceased, and said that the only claim of the plaintiff was as widow for the deceased for a derivative pension.

[2] In relation to the background facts, the following were agreed (see encl 34). The deceased joined the civil service on 1 March 1953 (confirmed on 1 March 1956) and was a store keeper at the Health Department in Ipoh. By letter dated 12 November 1983 (exh MHA–2), Abdul Mohsin bin Mohamed, Penguasa Kanan Ahli Kimia Ubat, Jabatan Perubatan dan Kesihatan, Perak, who was the chairman of the Disciplinary Board for the Clerical and Technical Group notified the deceased that he ('deceased') was absent without leave and that he ('deceased') was to report for duty at once. By letter dated 16 November 1983 ('MHA–3'), Abdul Mohsin bin Mohamed, again notified the deceased that he ('deceased') was absent without leave and that he ('deceased') was to report for duty at once. That letter dated 16 November 1983 ('MHA–3') was received by the deceased. The 'show cause' letter dated 31 December 1983 ('E–3') from the chairman of the Disciplinary Board was also received by the deceased. E–3 dated 31 December 1983 gave the deceased 14 days to answer to the misconduct, namely absence from duty without leave from 7 November 1983 to 31 December 1983. On 25 June 1984, a report of a prima facie case for disciplinary action ('MHA–5') was signed by Abdul Mohsin bin Mohamed. On 12 July 1984, the Disciplinary Board for the Clerical and Technical Group convened an inquiry; Abdul Mohsin bin Mohamed, who attended as member of the Disciplinary Board, recorded and confirmed the minutes of the proceedings ('MHA–6'). According to the minutes of that inquiry, the Disciplinary Board recommended the dismissal of the deceased without salary for the period of absence. Then by letter dated 7 December 1984 ('MHA–7'), Abdul Mohsin bin Mohamed again notified the deceased that he ('deceased') was absent without leave and that he ('deceased') was to report for duty at once. On 1 August 1985 (exh MHA–1), it was gazetted that the deceased was deemed dismissed with effect from 7 November 1983. After the death of the deceased on 5 February 1991 at the age of 59, the plaintiff applied to the defendants for a widow's pension, but she was turned down on the ground that the deceased had been dismissed.

[3] Miss Manjit Kaur submitted as follows. By gazette notification dated 1 August 1985, the deceased was deemed to have been dismissed on 7 November 1983. The deceased was absent from duty from 7 November 1983. The governing Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 was the second limb of general order 21(4) which provided that the head of department shall report the absence to the disciplinary authority ('DA') who may then institute disciplinary action against the deceased in accordance with general order 26 with a view to dismissal or reduction in rank. The procedure was under general order 26. The defendants proceeded under general order 21(5), where it was the procedure to send an AR registered letter. It was agreed that there was an AR registered letter dated 12 November 1983, but it was not agreed that it was received. The AR registered letter dated 16 November 1983 was received by

the deceased. According to the contents of the report dated 25 June 1984 ('MHA–5'), there was a telegram dated 22 November 1983 which stated that the deceased was not well. Under general order 26(2), the DA shall call upon the officer to state in writing within a period of not less than 14 days a representation containing grounds upon which he relies to exculpate himself. But the show cause letter dated 31 December 1983 ('E–3') required the deceased to reply within 14 days. The recommendation of the Disciplinary Board dated 12 July 1984 ('MHA–6') was not followed by the DA who dismissed the deceased. The show cause letter dated 31 December 1983 ('E–3') was issued under general order 21(5), while the disciplinary inquiry of 12 July 1984 ('MHA–6') was conducted under general order 21(4). The recommendation of the head of department must be followed in the form of punishment. One other failure in procedure was that Abdul Mohsin bin Mohamed also sat on the Disciplinary Board. A complainant should not sit on the Disciplinary Board (counsel cited *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487). The deceased was called to report for duty in spite of the Disciplinary Board's recommendation of dismissal. There was a decision to retain the deceased (counsel cited *Sungai Wangi Estate v UNI* [1975] 1 MLJ 136, p 141). An AR registered letter could not be sent without there being prior steps to trace the deceased (counsel cited *Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor v Aria Kumar & Anor* [1995] 2 MLJ 533). Two procedures were adopted. It was both general order 26 and general order 21. Having proceeded under general order 26, the defendants could not later switch to general order 21. General order 21 and general order 26 are mutually exclusive. In any event, general order 21 and/or general order 26 had not been complied.

[4] Mr Mohd Nasir for the defendants submitted as follows. General order 21 was the procedure adopted. The report ('MHA–5') was the first step in the disciplinary proceeding. The show cause letter dated 31 December 1983 ('E–3') was not served and all disciplinary action based on E–3 was not further pursued. The actual commencement of the disciplinary proceeding was the report in MHA–5 that was made under general order 21(4). Pursuant to the report in MHA–5, the Disciplinary Board sat on 12 July 1984 ('MHA–6'). The members of the Disciplinary Board were officers at the department level. Under general order 21(4), the DA must take action in accordance with general order 26 with a view to dismissal or reduction in rank. Hence, the recommendation of the Disciplinary Board was dismissal. The procedure under general order 21(4) was abandoned. It was general order 21(5) that was ultimately adopted. It was an agreed fact that MHA–7 was not delivered. The gazette (exh MHA–1) complied with both general orders 21(5) and 21(6).

[5] Miss Manjit replied that her basic objection was that the show cause letter gave 14 days to the deceased to reply whereas it should be more than 14 days. The show cause letter was issued under general order 21(5), but general order 21 and/or general order 26 was not complied. Mr Mohd Nasir answered that the disciplinary proceeding was not based on the show cause letter dated 31 December 1983 ('E–3'). The defendants proceeded under general order 21(5) and general order 21(6). General order 26 did not apply. MHA–2, MHA–3, MHA–4 and E–3, which were attempts to contact the deceased, showed that the deceased could not be traced. MHA–7 was the notice issued under general order 21(5) while MHA–8 was the proof that MHA–7 was undelivered. MHA–7 was received by the Kementerian Kesihatan Malaysia.

[6] Both counsel had their say. Now, what has the law got to say in relation to the facts? General order 21(1) provides that 'absence without leave or prior permission or without reasonable cause shall render an officer liable to disciplinary action'. It is beyond dispute that the deceased was absent for a period exceeding seven working days consecutively. For that period of absence, general order 21(4) provides:

> Where an officer is absent for a period exceeding seven working days in any calendar month, or exceeding seven working days consecutively, that fact shall forthwith be reported by the Head of Department to the Appropriate Disciplinary Authority together with the dates and circumstances of the absence and any further information which may be required concerning the officer. Upon consideration of the said report, the Disciplinary Authority may then institute disciplinary action against the officer in accordance with general order 26 with a view to dismissal or reduction in rank. Pending the decision of the Disciplinary Authority, the officer shall not be entitled to any salary or remuneration for the period of his absence.

[7] In short, general order 21(4) provides that the head of department shall report the fact of absence to the DA who may, not shall, institute an action in accordance with general order 26.

[8] Providing for the situation where an officer is absent and cannot be traced, general order 21(5) says:

> Where an officer is absent and cannot be traced, the Head of Department shall cause to be sent to the officer's last known address an AR (Acknowledged of Receipt) registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once. If within seven days after receipt of the letter the officer report for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of the general order. If seven days after the receipt of the letter by the officer, he is still absent or nothing is heard of or from him, the Head of Department shall proceed to submit a report to the Appropriate Disciplinary Authority as required under

> paragraph (4). Upon consideration of the said report the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this general order; but in case where the said letter is returned undelivered, the Disciplinary Authority shall take steps to notify in the Gazette the fact of the officer's absence and his untraceability.

[9] Hence, where an officer is absent and cannot be traced, the head of department shall cause to be sent to the officer's last known address an AR registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once (see *Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor v Aria Kumar & Anor* [1995] 2 MLJ 533, where it was held by the Court of Appeal that 'the AR registered letter … can only be sent, where an officer is absent and cannot be traced'). If within seven days after receipt of the letter the officer reports for duty, the DA shall, not may, institute disciplinary action either under paras (3) or (4) of general order 21. In other words, where the officer reports for duty within seven days, the DA shall institute disciplinary action under paras (3) or (4) of general order 21. If seven days after the receipt of the letter by the officer, he is still absent or nothing is heard of or from him, the head of department shall proceed to submit a general order 21(4) report to the DA who upon consideration of the report shall, not may, institute disciplinary action under paras (3) or (4) of general order 21. In other words, if the officer is still absent or not heard of or from him after seven days, the head of department shall proceed to submit a general order 21(4) report to the DA who upon consideration of the report shall, not may, institute disciplinary action either under paras (3) or (4) of general order 21. But where that letter is returned undelivered, the DA shall take steps to notify in the gazette the fact of the officer's absence and his untraceability.

[10] As for the legal effect of the notification in the gazette of the fact of the officer's absence and untraceability, general order 21(6) provides:

> If despite notification in the Gazette, the officer fails to return for duty within a period of seven days from the date of the publication of the Gazette, the officer shall be deemed to have been dismissed from the service with effect from the date of his absence. If within seven days after the publication of the Gazette the officer reports for duty, the Appropriate Disciplinary Authority shall institute disciplinary action either under paragraph (3) or (4) of this general order.

[11] Accordingly, where an officer fails to return for duty within seven days from the date of publication of the gazette, then he shall be deemed to have been dismissed from service with effect from the date of absence. If the officer

reports for duty within the stipulated seven days, then the DA shall institute disciplinary action under paras (3) or (4) of general order 21.

[12] It pans out, that the head of department shall submit a general order 21(4) report to the DA (i) where an officer is absent for a period of seven working days in any calendar month or exceeding seven working days consecutively [see first limb of general order 21(4)], or (ii) where an officer who has received a general order 21(5) AR registered letter and seven days have passed, is still absent or not heard of or from him. It also pans out that under general order 21(4), the head of department is not required to send to the officer's last known address an AR registered letter requiring him to give an explanation as to his absence and at the same time directing him to report for duty at once. Under general order 21(4), the procedure is that the fact of absence shall forthwith be reported by the head of department to the DA together with the dates and circumstances of the absence and any further information which may be required concerning the officer, and upon consideration of the said report, the DA may institute disciplinary action against the officer in accordance with general order 26. By contrast, the DA shall institute disciplinary action under paras (3) or (4) of general order 21 in the following situations: (i) against an officer who has reported for duty within seven days of receipt of the AR registered letter, or (ii) against an officer who has received AR registered letter but is still absent or not heard of and seven days have passed since receipt of the AR registered letter.

[13] An AR registered letter under general order 21(5) is the procedure where an officer is absent and also cannot be traced. If seven days after receipt of that letter by the officer, he is still absent or not heard of, then the head of department shall submit the general order 21(4) report.

[14] However, where the registered letter is returned undelivered, then the DA shall take steps to notify in the gazette the fact of the officer's absence. If despite notification in the gazette, the officer fails to return for duty within a period of seven days from the date of publication of the gazette, then the officer shall be deemed dismissed from service with effect from the date of his absence.

[15] It was submitted that the defendants adopted the procedure under both general order 26 and general order 21. And that submission was not entirely unjustified. First, the defendants proceeded under general order 21(5), as the AR registered letter was a procedure only under general order 21(5). Had the defendants proceeded under general order 21(4), then the general order 21(4) report would have been the first thing done by the head

of department and not the second as in the instant case. Now having proceeded under general order 21(5), the next step should have been, if the AR registered letter were delivered, the submission of the general order 21(4) report by the head of department to the DA who shall institute disciplinary action, or, if the AR registered letter were undelivered, the notification in the gazette by the DA of the fact of the officer's absence and untraceability. At that stage, only the DA could take it one step further, that is, to institute disciplinary action with a view to dismissal or reduction in rank or take steps to notify in the gazette. But that was not the case, for the next two action were taken by chairman of the Disciplinary Board who issued a show cause letter ('E–3') to the deceased and also submitted a report ('MHA–5') of a prima facie case with a recommendation of dismissal, and by the Disciplinary Board who directed, on 12 July 1984 ('MHA–6'), the dismissal of the deceased, which action could not have been taken by the chairman or by the Disciplinary Board. Under general order 26(2), it was for the DA to find 'that there is a prima facie case for dismissal or reduction in rank, to issue the letter in writing of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank, and to call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself' (see *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61, where it was held by the former Supreme Court that the procedure adopted — the Disciplinary Board deciding that proceedings for dismissal should be instituted and the PSC writing the show cause letter — was in compliance with general orders 24 and 26 of the 1980 General Orders, and that the chairman of the Disciplinary Board had no power of dismissal). General order 26(5) empowers the DA to appoint a committee of inquiry. But that committee of inquiry could do no more than submit a report to the DA. Only the DA could decide on the dismissal of the deceased. The defendants had not got it right, procedure wise.

[16] However, it was explained that all disciplinary proceedings based on letters dated 12 November 1983 ('MHA–2') or 16 November 1983 ('MHA–3') were halfway abandoned. And so it would seem, for the next act by the defendants, the issuance on 7 December 1984 of a fresh AR registered letter ('MHA–7') by the head of department to the deceased was the first step in the procedure under general order 21(5). Crucially, that AR registered letter dated 7 December 1984 was returned undelivered (see MHA–7). The letter of the postal authority ('MHA–8') was confirmation that the deceased could not be traced. By a process of trial and error, the defendants had reached the last procedural hurdle. All conditions had been satisfied for

the DA to take steps to notify in the gazette the fact of the deceased's absence and untraceability. In the event, those steps were taken by the Public Services Commission who instructed (see SS–1 dated 9 July 1985) the Ministry of Health to notify in the gazette the fact of the deceased's absence and untraceability. To its credit, the Public Services Commission even took particular care to provide a copy of the required notification in the gazette to ensure due observance of the last limb of general order 21(5). Yet somehow it still turned out that the notification in the gazette was short on full and complete compliance.

[17] The pertinent Government Gazette Notification No 3968 dated 1 August 1985, read as follows:

> Jawatan-jawatan yang tersebut di bawah ini telah dikosongkan oleh penyandang-penyandangnya kerana meninggalkan jawatan-jawatan tanpa cuti atau lain-lain sebab yang munasabah. Adalah dimaklumkan sekiranya mereka masih juga tidak bertugas dalam tempoh tujuh (7) hari dari tarikh Penyiaran Warta ini, mereka hendaklah dianggap sebagai telah dibuang kerja mulai tarikh meninggalkan jawatan:

Nama Penyandangnya	Jawatan dan Tempat Kerjanya	Tarikh Meninggalkan Jawatan dan lain-lain hal
Mohd Basri bin Hussein	Penyelenggara Stor, Tingkatan Kanan, Stor Perubatan Pusat, Negeri Perak, Ipoh, Perak	7 November 1983 (SPA 27418/3)

[18] The fact of the absence of the deceased was notified in that Gazette but the fact of the untraceability of the deceased was not. That was a failure in procedure, which could not be treated as de minimis in favour of the defendants, as it was a breach of a provision which concerned the livelihood of the deceased and the right of the plaintiff to a derivative pension (for an analogy, see *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65, where it was held by the former Supreme Court that the maxim *de minimis non curat lex* (the law does not concern itself with trifles) can have no application in a case where the breach of a mandatory requirement involves the civil liberty of an individual). Given that the breach could not be treated as *de minimis*, this application could not be dismissed. The only course open is to grant this application and declared the dismissal of the deceased as invalid, which is now accordingly ordered (see *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257, where it was held by the Court of Appeal that non-compliance of the mandatory

requirements of the Public Officers (Conduct & Discipline) Regulations 1993 will result in a dismissal being declared invalid). A

Application allowed.

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Reported by Sally Kee

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